United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 26, 2009

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Tri County Building and Construction Trades Council
(Northern Ohio Chapter of Associated Builders and Contractors)
Cases 8-CE-110 through 8-CE-124 & 8-CC-1785
through 8-CC-1799

The Region submitted these cases for advice as to whether a building and construction trades council and 14 member Unions violated Section 8(e) by executing a project labor agreement with a nonstatutory employer, requiring that employer to subcontract only with contractors that agree to abide by the terms of the crafts' collective-bargaining agreements, and to incorporate the project labor agreement into its construction contracts.

We conclude that the Region should dismiss the charges because the underlying project labor agreement, whether viewed as an agreement between the Unions and the Akron Board of Education, a public entity, or as an agreement between the Unions and the contractors, would be protected by the construction industry proviso. Further, there are weaknesses in the argument that the Unions are liable under a third-party beneficiary theory.

FACTS

Background

In 2002, the City of Akron and the Akron City School District Board of Education ("BOE") decided to construct or renovate about 45 community learning centers for use by the City and BOE. In February 2007, the Ohio School Facilities Commission ("OSFC"), a state entity that oversees school construction projects, adopted a new policy authorizing use of project labor agreements ("PLAs") for school projects. In response to the policy change, the Tri-County Building and Construction Trades Council ("BCTC") approached the BOE and proposed using PLAs on the BOE's future community

learning center projects. BCTC representatives then met with BOE officials to discuss the Unions' proposal. The parties discussed the BCTC's ongoing concerns with labor problems at various school construction sites,[1] the BOE's problems with staying on budget, and its need to meet state-mandated "EDGE" goals for hiring a certain percentage of minorities, women, and Akron residents. BCTC representatives suggested the PLA as a way to address both the Unions' and BOE's concerns. They offered to include a no-strike clause in the PLA to prevent labor strife that could disrupt schedules and cause budgetary overruns. They noted that seven of the trade unions' collective-bargaining agreements were set to expire in summer 2009, and that if negotiations broke down, a no-strike clause would ensure that work continued on school construction. The BCTC representatives also offered to incorporate EDGE goals into the PLA.

Between April 2007 and April 2008, the BOE and the Joint Board of Review ("Joint Board")[2] held a series of public hearings to consider whether to use a PLA in the construction of the Leggett Community Learning Center ("Leggett Center"). Union and nonunion contractors spoke about the PLA's potential effect on labor strife, construction schedules, and budget goals. At the final hearing, a BCTC representative argued that a PLA would prevent strikes and assure timely completion of the project, and a nonunion contractor argued that the PLA was unnecessary to avoid labor unrest.

Following the hearings, the BOE and the state OSFC approved the use of a PLA for the Leggett Center. In early August, the BCTC and 14 individual unions ("the Unions") signed the PLA.[3]

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[1] The evidence includes incidents of labor strife during the construction of the first eight or nine community learning centers in the master plan, including picketing over the use of out-of-town labor; a refusal to cross a picket line; and a noose hung at a site where there were conflicts between Union and Guatemalan workers.

[2] The Joint Board was formed by the City of Akron and the BOE to monitor community learning center construction.

[3] The initial PLA was intended to include the Carpenters Union. However, the Carpenters Union did not sign the PLA

Bidding was open to all contractors regardless of union status and at least five nonunion contractors bid on the project.[4] In September 2008, the BOE notified successful bidders of their awards and the BOE and OSFC signed contracts with the successful bidders.[5] At last report, the Operating Engineers, the sole Union thus far to have performed work on the Leggett Center project, is clearing and preparing the site. There is no evidence that the Unions have sought to enforce the contracts between the BOE and the contractors.

The PLA's provisions

The PLA is a site-specific agreement for the Leggett Center project between the BCTC, the 14 individual Unions, and the BOE. Article I, "Purpose," provides in pertinent part:

> . . The Parties recognize the need for the timely completion of the Project without interruption or delay. This Agreement is intended to enhance this effort through the establishment of a framework for cooperative and stable relations between labor and management
>
> Further, the parties have mutually established and stabilized wages, hours and working conditions for the craftworkers on this construction project to facilitate close

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after it was amended to make it project specific. The winning bidder for the carpentry work has a collective-bargaining agreement with the Carpenters Union.

[4] Charging Party ABC is a chapter of a national trades association of nonunion construction industry employers and suppliers. ABC contends that its members either bid on the work at issue and lost because the project labor agreement added costs to their bids, or that they did not bid because of these costs.

[5] Each contractor signed the PLA Letter of Assent, described below.

> cooperation between the Co-owners[6] and each Signatory Contractor, the Council, the Unions and Local Unions to the end that a satisfactory, continuous and harmonious relationship will exist between the Parties to this Agreement.
>
> Therefore, in recognition of the special needs of this Project and to maintain a spirit of harmony, labor-management peace, and stability during the term of this Agreement, the Parties have established effective and binding methods for the settlement of all misunderstandings, disputes or grievances regarding labor issues that may arise. Further, the Signatory Contractors and all subcontractors of whatever tier, agree not to engage in any lockout, and the Unions . . . agree not to engage in any strike, slow-down, or interruption or other disruption of or interference with the work covered by this Agreement.

Consistent with that purpose, Article XI, "Work Stoppages and Lockouts," prohibits strikes or lockouts and authorizes a contractor to seek an immediate injunction in the event of a work stoppage, strike, picketing or disruptive activity. Article XII, "Disputes and Grievances," provides that in order to "maintain continuous and uninterrupted performance," the parties will abide by a grievance and arbitration procedure and that work will continue uninterrupted during the grievance process.

Article II, "Scope of Agreement," requires all contractors working on the Leggett Project to be bound by the PLA and to sign a Letter of Assent, which provides in relevant part:

> [T]he undersigned party hereby agrees that it will comply with and be bound by all of the terms and conditions of the [PLA] and agrees to all approved amendments or revisions thereto. . . .

The Letter of Assent further provides that it "shall ONLY apply to the [Leggett] Project . . . ."

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[6] The BOE and the OSFC are described respectively as "Owner" and "Co-Owner."

The PLA requires the contractors to recognize the Unions as the sole and exclusive bargaining representatives of all craft employees within their respective jurisdictions working on the Project; use the Unions' referral halls; provide the wages and benefits set forth in the respective Union's collective bargaining agreements; deduct dues at the Union's request; and require employees to become members of the appropriate Union within seven days of employment and remain members during the term of the agreement.[7] The PLA contains a management rights clause.[8]

The PLA also requires the Unions and contractors to make good faith efforts to achieve the Leggett Project's EDGE goals.[9]

The BOE's Role

The BOE functions as its own general contract manager on the Leggett Center project. The BOE's Facility Planning Director oversees planning, design, and construction. During the bidding process, the Facility Planning Director approved bid specifications, reviewed bid recommendations from a project manager, architect, and construction manager, and presented his recommendations to the Joint Board. The Joint Board made its recommendations to the BOE, which awarded the bids. The BOE's Facility Planning Director also responded to bidders' requests for information regarding the bids and the PLA.

A construction manager hired by the BOE oversees the Leggett project. The construction manager's onsite representative reports both to the BOE's Facility Planning Director and to an OSFC project administrator. The BOE's Facility Planning Director visits the job site about once every two weeks. BOE project managers, who report to the BOE's Facility Planning Director, visit the job site twice a week, where they attend job meetings with contractors to

[7] Articles III, V, IX, XIV.

[8] Article IV.

[9] Article VII.

discuss work progress and future work schedules. Pursuant to the PLA, the BOE has authority to require more workers on a job, reject employees for poor performance, assess whether contractors are meeting job requirements, issue stop work orders for safety issues, take part in the grievance/arbitration process, and impose progressive discipline.[10] The BOE has set hours through its project specifications, instituted a substance abuse policy, established uniform work and safety rules, and invoked its right to refuse certain employees.

ACTION

The charges should be dismissed, absent withdrawal, because the underlying PLA, whether viewed as an agreement between the Unions and the BOE, a public entity,[11] or as an agreement between the Unions and the construction employers, as a third party beneficiary, likely would be protected by the construction industry proviso.[12] Further,

[10] Articles V, X, XII, and XVIII.

[11] As in Boilermakers Local Lodge 744 (Industrial Energy Systems, Inc.)("IES"), Cases 8-CE-92-109 & 8-CC-1761-1778, Advice Memorandum dated Oct. 30, 2008, at 7, one of the issues in this case would require the Board to revisit application of Section 8(e) to a public entity acting in its proprietary capacity. Current Board law is based upon an interpretation of the statutory definition of "employer." While changes in statutory definitions are normally made through the legislative process, we do not foreclose the possibility that, in an appropriate case, a complaint would issue seeking reversal of current Board law in light of Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993) ("Boston Harbor"). For the reasons discussed in text, however, this case is not an appropriate vehicle for presentation of that issue.

[12] We also believe it appropriate to give the Board an opportunity, in an appropriate case, to address whether it wishes to adhere to its position that Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 633 (1975), should be read to "suggest, in dicta, that secondary union-signatory clauses might be protected by the proviso *even without a collective bargaining relationship* if they were directed toward the reduction of friction that may be caused when

there are weaknesses in the argument that the Unions are liable under a third-party beneficiary theory.[13]

I. THE UNIONS' PLA WITH THE BOE

A. The BOE'S Status as a Political Subdivision

It is undisputed that the BOE is a political subdivision and therefore is not a Section 2(2) employer. The Board has long held that Section 8(e) only applies to agreements between statutory labor organizations and statutory employers.[14]

B. Proviso Protection for the PLA

The construction industry proviso to Section 8(e) protects by its terms secondary agreements between unions and employers "in the construction industry" regarding the subcontracting of work "to be done at the site of the construction[.]" In addition, in Connell Construction, the

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union and nonunion employees of different employers are required to work together at the same jobsite." Glens Falls Bldg. & Constr. Trades Council (Indeck Energy Services), 350 NLRB 417, 421 (2007)(footnote omitted)(emphasis in original). For the reasons discussed in text, however, this case is not an appropriate vehicle for presentation of that issue.

[13] Notwithstanding the decision in this case, we believe it appropriate to bring a case to the Board testing the novel theory that, under certain circumstances, the Unions may be said to have "enter[ed] into" an agreement with a contractor as a result of their third-party beneficiary status under a commercial contract such as the one entered into here between the contractors and the Unions. For the reasons discussed in text, however, this case is not an appropriate vehicle for presentation of that issue.

[14] See IBEW Local 3, 244 NLRB 357, 359 (1979). In IES, Cases 8-CE-92-109 & 8-CC-1761-1778, Advice Memorandum, at 7, the charging party urged the Board to reverse this longstanding precedent where a public employer is acting in its proprietary capacity. Here, Charging Party ABC has not done so. In any event, as in IES, we would not do so here because of the reasons discussed in text.

Supreme Court applied the proviso to "agreements in the context of collective-bargaining relationships and ... possibly to common-situs relationships on particular jobsites as well."[15]

The Board has interpreted Connell Construction to hold that a clause loses its proviso protection if negotiated outside the context of a collective-bargaining relationship "unless, possibly," the clause is addressed to common-situs problems on a particular jobsite.[16] However, the Board has not reached the question whether proviso protection exists in the absence of a collective-bargaining relationship. That is because there was no evidence in earlier cases that the secondary clauses were intended to reduce jobsite friction.[17] The Board continues to interpret Connell as "suggest[ing], in dicta, that secondary union-signatory clauses might be protected by the proviso *even without a collective-bargaining relationship* if they were directed toward the reduction of friction that may be caused when union and nonunion employees of different employers are required to work together at the same jobsite."[18] Based on those Board cases, the Division of Advice continues to follow this analysis.[19]

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[15] Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 633 (1975).

[16] See Iron Workers Pacific Northwest Council (Hoffman Constr.), 292 NLRB 562, 580 (1989)(quoting Colorado Bldg. & Constr. Trades Iron Workers, 239 NLRB 253, 256 (1978), enf'd, 913 F.2d 1470 (9th Cir. 1990)).

[17] See Glens Falls, 350 NLRB at 421 (secondary clauses were executed in order to remove union opposition to regulatory approval of the project and not to reduce jobsite friction); St. Joseph Equipment Corp., 302 NLRB 47, 48 (1991) (agreement for the limited purpose of obtaining general contractor's guarantee of subcontractor's benefit fund contributions).

[18] Glens Falls, 350 NLRB at 421 (footnote omitted) (emphasis in original).

[19] See Tri-Counties Bldg. & Constr. Trades Council (Shea Properties, LLC), Cases 31-CE-224 & 31-CC-2156, Advice Memorandum dated Oct. 18, 2007, at 1 ("further investigation is needed to determine whether the PLA was negotiated in the context of a collective bargaining

Therefore, the PLA here is protected under the construction industry proviso if: (1) the BOE is "an employer in the construction industry;" and (2) the PLA was negotiated in the context of a collective-bargaining relationship, or "directed toward the reduction of [jobsite] friction;"[20] and (3) the subcontracting clause applies only to work performed at the construction worksite.[21] As discussed below, we conclude that the construction industry proviso protects the PLA because the BOE is an employer in the construction industry; the PLA was intended to reduced jobsite friction; and the subcontracting clause applies only to work performed at the construction site.

1. The BOE is an employer in the construction industry

Whether the BOE is an employer in the construction industry turns on "the circumstances of each situation, rather than upon the principal business of the employer."[22] In making that determination, the Board considers the extent to which a particular employer retains control over construction, thereby functioning as a general contractor.[23] Relevant factors include whether the employer awards contracts, oversees work performed at the site, conducts

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relationship and, if not, whether the PLA is otherwise lawful because it was negotiated for the purpose of reducing jobsite friction")(citing Connell Constr. Co., 421 U.S. at 633).

[20] See Glens Falls, 350 NLRB at 421.

[21] Carpenters Local 944 (Woelke & Romero Framing, Inc.), 239 NLRB 241, 248-249 (1978), enfd., 654 F.2d 1301 (9th Cir. 1981), affd. in rel. part, 456 U.S. 645 (1982). See Iron Workers (Southwestern Materials), 328 NLRB 934, 937 (1999).

[22] Carpenters Local 743 (Longs Drug), 278 NLRB 440, 442 (1986).

[23] See Los Angeles Bldg. & Constr. Trades Council (Church's Fried Chicken), 183 NLRB 1032, 1037 (1970).

regular site visits, supervises performance, and controls labor relations.[24]

Here, the evidence demonstrates that the BOE is an employer in the construction industry because it functions as its own general contractor on the Leggett Project and retains control over labor relations. The BOE controlled the bid process and awarded bids. The BOE's Facility Planning Director oversees the entire planning, design, and construction process. In that regard, the Facility Planning Director determines whether contractors are meeting job requirements, visits the job site every other week, and directs the work of BOE employees who visit the job site twice a week to meet with contractors and discuss work progress. The BOE also retains control over labor relations through its authority to require more workers on a job, reject employees for poor performance, assess whether contractors are meeting job requirements, issue stop work orders for safety issues, take part in the grievance/arbitration process, and impose progressive discipline. The BOE has set hours through its project specifications, instituted a substance abuse policy, established uniform work and safety rules, and invoked its right to refuse certain employees.

2. The PLA was intended to reduce jobsite friction

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[24] See Milwaukee & Southeast Wisconsin Dist. Council of Carpenters (Rowley-Schlimgen), 318 NLRB 714, 716 (1995) (office supply retailer that subcontracted for the installation of floor covering was engaged in the construction industry because it employed the principal of the subcontractor and, through him, retained control over labor relations and work performed at the job sites); Los Angeles Bldg. and Constr. Trades Council (Church's Fried Chicken), 183 NLRB at 1037 (owner of retail food business was employer engaged in the construction industry where it employed a construction superintendent who hired all the subcontractors and supervised their performance). Cf. Carpenters Local 743 (Longs Drug), 278 NLRB at 442 (retail employer was not employer engaged in the construction industry where it did not function as its own general contractor, made only sporadic visits to the jobsite, and used its own employees for the limited purpose of installing fixtures during the last two weeks of an eight-month project).

The evidence establishes that the PLA was directed toward the reduction of jobsite friction.[25] Most significantly, the PLA "Purpose" article describes its entire purpose as the "timely completion of the project without interruption or delay through a framework for stable labor-management relations." Toward that end, the PLA covers all construction work on the site; prohibits strikes or lockouts; authorizes a contractor to seek an immediate injunction in the event of a work stoppage, strike, picket or disruptive activity; and provides for a grievance and arbitration procedure in order to "maintain continuous and uninterrupted performance" during the grievance process.

That the PLA was intended to reduce jobsite friction is buttressed by the fact that BCTC and Union representatives, both at meetings with BOE representatives and during the PLA approval hearings, promoted the PLA as a means to avoid labor strife and prevent work stoppages. They offered a no-strike clause and argued that it would be particularly important for the Leggett project because seven trade unions' collective bargaining agreements were set to expire in summer 2009. According to the BCTC, there had been incidents of labor strife during the construction of earlier community learning centers, including picketing over the use of out-of-town labor, a refusal to cross a picket line, conflicts with Guatemalan workers, and a noose hung on a jobsite. Further, the BOE Facility Planning Director acknowledged that maintenance of labor peace was an important reason for the PLA.

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[25] We agree with the Region that, as in IES, Cases 8-CE-92-109 & 8-CC-1761-1778, Advice Memorandum at 10-11, the PLA was not negotiated in the context of a collective-bargaining relationship because the BOE does not employ any construction employees and does not have a collective-bargaining agreement with any of the Unions. See Glens Falls, 350 NLRB at 421 (union's agreements with Indeck, the owner-operator of a power facility, and its general contractor were not negotiated in the context of collective-bargaining relationships because Indeck had no employees in the building and construction trades and neither Indeck nor its general contractor intended to employ any trade employees on the jobsite); St. Joseph Equipment Corp., 302 NLRB at 48; Iron Workers Pacific Northwest Council (Hoffman Constr.), 292 NLRB at 580-81.

The fact that the Carpenters' Union opted out of the PLA after it was amended to make it project specific does not warrant the conclusion that the PLA cannot reduce jobsite friction. Here, as in IES,[26] the parties' intent was to negotiate an agreement covering all the unions that had jurisdiction over the work to be performed. Moreover, the winning bidder for the carpentry work has a collective-bargaining agreement with the Carpenters' Union.[27]

3. The subcontracting clause applies only to work performed at the construction worksite.

We agree with the Region that the PLA is limited to onsite work. The PLA provides that it:

> applies and is limited to the recognized and accepted historical definition of construction work . . . . Such work shall include . . . site preparation work and dedicated off-site work, except for work performed by contractors and subcontractors specifically excluded from application of this Agreement. Any off-site prefabrication of any building materials, systems

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[26] Cases 8-CE-92-109 & 8-CC-1761-1778, Advice Memorandum, at 12.

[27] The cases upon which the Charging Party relies to support its argument that the PLA was not intended to reduce job site friction are distinguishable. See Iron Workers Pacific Northwest Council (Hoffman Constr.), 292 NLRB at 563 n.5, 580 (agreement was not meant to reduce jobsite friction where it allowed for the possibility of union and nonunion employees working side by side and did not address problems caused by common situs relationships on a particular jobsite); Colorado Bldg. & Constr. Trades, 239 NLRB at 256 (agreement not meant to reduce jobsite friction where it did not restrict subcontracting of other types of work at the jobsite or apply only to jobsites where the union's members were working). See also Sun Ridge LLC, Cases 32-CE-77-79, Advice Memorandum dated April 5, 2004, at 11, where Advice concluded that a secondary agreement was not meant to reduce jobsite friction where it covered only three trades at the jobsite and even in those trades allowed for the possibility of nonunion subcontracting if there was a sufficient differential in subcontractors' bid prices.

> and/or components traditionally performed on site shall be performed by the appropriate craft signatory to this Agreement.

The PLA further provides that the PLA does not apply to:

> [t]he delivery to the project of any material by any means, except for site placed concrete, or removal from the Project of any material by any means.

Charging Party ABC contends that the above language also applies to offsite work and to the delivery of ready-mix concrete. Although these sections arguably are facially broad enough to be construed in that manner, they can easily be interpreted "to require no more than what is allowed by law."[28] Thus, the phrase "dedicated off-site work" can be interpreted to apply only to work traditionally performed on site since the clause preceding it clearly limits its application to traditional construction work, and the clause following it excludes "work performed by contractors and subcontractors specifically excluded from application of this Agreement." Similarly, the requirement that any "off-site prefabrication . . . shall be performed by the appropriate craft signatory to this Agreement," can be read to apply only to off-site work traditionally performed at the jobsite.[29]

More importantly, there is no evidence that the PLA was either intended to be applied to offsite work or that

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[28] Teamsters Local 982 (J.K. Barker Trucking Co.), 181 NLRB 515, 517 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971) (in construing a Section 8(e) agreement, the Board will interpret it "to require no more than what is allowed by law" if it is not clearly unlawful). In IES, Cases 8-CE-92-109 & 8-CC-1761-1778, Advice Memorandum, at 12, Advice also concluded that the PLA language lawfully was limited to onsite work even though it was facially broad enough to apply to offsite work.

[29] An otherwise cease-doing-business clause is primary and lawful if it is intended to preserve unit work or, even if secondary, falls within the construction industry proviso. See Iron Workers (Southwestern Materials), 328 NLRB at 936-937.

the Unions ever sought to apply it to offsite work.[30] Thus, the PLA should be construed in a manner that places it within the construction industry proviso.[31]

II. THE UNIONS' "AGREEMENT" WITH THE CONTRACTORS

A. Third-Party Beneficiary Theory

We have concluded that the PLA between the Unions and the BOE is lawful. However, if it were determined otherwise and no jurisdiction could be asserted over the BOE as a Section 2(2) employer, there is a question whether the incorporation of the PLA into the BOE's contract with the contractors gives rise to a Section 8(e) violation. In the Parma cases, we relied upon a third-party beneficiary theory to authorize issuance of a Section 8(e) complaint based upon a project labor agreement that required a municipality to incorporate into its contracts with its subcontractors a secondary clause restricting the use of nonunion cartage contractors that was clearly applicable to offsite work.[32] We reasoned that the unions could be considered to have "enter[ed] into" the construction contracts, since, under Ohio law, they had a right to enforce those contracts as intended third-party beneficiaries.[33] Later, however, we concluded that the purposes and policies of the Act would not be effectuated by litigating that novel theory in those cases and directed

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[30] See id. at 937 (Board held that a secondary clause that was not limited to onsite work on its face was nevertheless proviso-protected, in the absence of evidence that the clause had been or was intended to be applied to offsite work).

[31] Id. at 937. In any event, even if it were concluded that these provisions were unlawful, the balance of the PLA would still be protected by the construction industry proviso.

[32] Asbestos Workers Local 3 (Northern Ohio Chapter, Associated Builders & Contractors) ("Parma"), Cases 8-CE-38-58, Advice Memorandum dated Nov. 24, 1998, at 4-5.

[33] Id. at 4-5.

dismissal of the charges, because there was almost a complete absence of benefit to the unions.[34]

In IES, a political subdivision, MetroHealth, entered into a PLA with 16 unions covering a number of hospital construction projects and then entered into a construction contract with IES that incorporated the PLA.[35] There, as in the Parma cases, we reasoned that the unions could be considered to have "enter[ed] into" the construction contracts as intended third-party beneficiaries because the political subdivision intended to give those unions the benefit of the companies' promised adherence to their collective-bargaining agreements. In concluding that the unions arguably "enter[ed] into" the construction contracts, we further relied on the rationale that two of the unions had filed Section 8(a)(5) charges against IES seeking to enforce MetroHealth's contract with IES.[36] Thus, the unions had arguably "enter[ed] into" the MetroHealth's contract with IES by seeking to enforce that contract.[37]

Here, BCTC and the 14 Unions that signed the Leggett Project PLA were the intended beneficiaries of the BOE's contracts with the contractors because the BOE, the promisee in the construction contracts, intended to give these unions the benefit of the companies' promised adherence to their collective-bargaining agreements. However, unlike in IES, the Unions did not file Section 8(a)(5) charges or a state court action against the

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[34] Parma, Cases 8-CE-38-58, Advice Memorandum dated July 26, 1999, at 3.

[35] IES, Cases 8-CE-92-109 & 8-CC-1761-1778, Advice Memorandum, at 2.

[36] See IES, Cases 8-CA-37472 & 37474, Advice Memorandum, at 3.

[37] See Painters Orange Belt Dist. Council 48 (Maloney Specialties), 276 NLRB 1372, 1385-86 (1985) (when a contracting party seeks to enforce contractual commitments or requests another party's compliance, that constitutes a reaffirmation sufficient to satisfy the "enter into" language of Section 8(e)). As discussed above, we concluded that IES was not an appropriate vehicle to test this theory because the underlying PLA was protected by the construction industry proviso. Cases 8-CE-92-109 & 8-CC-1761-1778, Advice Memorandum at 14.

contractors seeking to enforce the BOE's contract with the contractors. Thus, it cannot be said that they "enter[ed] into" the BOE's contract with the contractors by seeking to enforce it. In that regard, the Unions' status as third party beneficiaries does not give rise to liability under Ohio state law since they are not parties to the contract, and never sought to enforce it.[38] Moreover, here as in Parma, there is little evidence that the parties have yet benefited from their third party beneficiary status because work on the project has barely begun.[39] Thus, the charges may be premature. In sum, there are weaknesses in the argument that the Unions are liable under a third-party beneficiary theory.

B. Proviso Protection for the PLA Between the Unions and the Contractors

As in IES, we conclude that we should not issue complaint based upon this novel theory of violation because the PLA, when viewed as an agreement between the Unions and the contractors, remains protected by the construction industry proviso. First, there is no question that the contracting employers are employers in the construction industry. Second, if the PLA is viewed as an agreement between the Unions and the contractors, then the agreement

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[38] See Motorsport Eng'g, Inc. v. Maserati SPA, 316 F.3d 26 (1st Cir. 2002) (the third-party beneficiary, who did not sign the contract, is not liable for either signatory's performance and has no contractual obligations to either); Abraham Zion Corp v. Lebow, 761 F.2d 93, 103 (2d Cir. 1985)(plaintiffs' contention that defendant was a third-party beneficiary of that agreement does not advance their cause since the question is not defendant's right to enforce the agreement, but rather the right of the plaintiffs to enforce the agreement against defendant); Comer v. Micor, Inc., 278 F. Supp. 2d 1030 (N.D. Cal. 2003), aff'd, 436 F.3d 1098 (9th Cir. 2006). See also Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258 (Ohio 2007)(only signatories to an arbitration agreement are bound by its terms and unless the company proves that the decedent's beneficiaries specifically agreed to arbitrate their wrongful-death claims, they should not be bound to do so).

[39] See Parma, Cases 8-CE-38-58, Advice Memorandum dated July 26, 1999, at 3.

itself arguably gives rise to a collective-bargaining relationship within the meaning of Connell Construction. The Board typically has found that a secondary clause is negotiated outside the context of a collective-bargaining relationship where the general contractor had no employees performing construction work and had no intention of hiring any such employees.[40] This is not the case here. The contractors are construction contractors who hire craft employees and agreed to abide by the terms and conditions of the Unions' collective-bargaining agreements while performing work on the Leggett Project. Further, the Leggett PLA includes a recognition clause, a union security clause, and a management rights clause.

Third, the PLA was directed at reducing jobsite friction, for the reasons already stated. In any event, since the agreement arguably gave rise to a collective-bargaining relationship under Connell, regardless of whether the agreement was intended to reduce job-site friction, the PLA may well be protected by the construction industry proviso to Section 8(e).

Conclusion

Accordingly, because these cases raise several novel issues pertaining to the application of Section 8(e) to a project labor agreement with a political subdivision, which nevertheless is arguably protected by the construction industry proviso, we conclude that this is not the appropriate vehicle to place novel Section 8(e) theories before the Board. The Region should therefore dismiss the charges in these cases, absent withdrawal.[41]

/s/
B.J.K.

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[40] See Glens Falls, 350 NLRB at 421; St. Joseph Equipment Corp., 302 NLRB at 48. See also IES, Cases 8-CE-92-109 & 8-CC-1761-1778, Advice Memorandum, at 15.

[41] Because we conclude that the Region should dismiss the Section 8(e) charges, the Section 8(b)(4)(ii)(A) charges should be dismissed.